STATE OF MICHIGAN

COURT OF APPEALS

JEANNIE L. COLLINS, Personal Representative of the Estate of RICHARD E. COLLINS, Deceased, and KIRBY TOTTINGHAM,

Plaintiffs-Appellants,

V

MAES CORPORATION, d/b/a AUTO IMAGES OF JACKSON, ERIC MAES, and APRIL MAES,

Defendant-Appellees.

UNPUBLISHED
March 22, 2005

No. 251795
Jackson Circuit Court
LC No. 02-002521-NO

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's granting of defendants' motion for summary disposition. We affirm.

I. FACTS

This case arises from an automobile-motorcycle accident that took the life of plaintiff Jeannie Collins' decedent, Richard Collins, and severely injured plaintiff Kirby Tottingham. On June 7, 2000, Collins and Tottingham were riding their motorcycles when they were struck by a truck driven by Tracie Mahan. In March 1999, more than a year before the accident, at Mahan's request and according to her specifications, defendants applied nonreflective tinting film to the windows of Mahan's truck. At the time of the accident, Mahan was driving the truck in violation of MCL 257.709, which provides that a person shall not drive a vehicle on public roads with non-reflective film extending below the top four inches of the windows adjacent to the driver or front passenger.[1] Mahan pleaded guilty to criminal charges arising from the accident. Plaintiffs

[1] Specifically, MCL 257.709 provides that "A person shall not drive a motor vehicle with . . . nonreflective film upon or in the front windshield, the side windows immediately adjacent to the driver or front passenger, or the sidewings adjacent to and forward of the driver or front passenger, except that a tinted film may be used along the top edge of the windshield and the side windows or sidewings immediately adjacent to the driver or front passenger if the material does not extend more than 4 inches from the top of the windshield, or lower than the shade band,
(continued…)

filed a civil action against Mahan; they then filed this action seeking to recover damages from defendants based on defendants' role in installing the window tinting in Mahan's truck, asserting claims founded on negligence, breach of contract and civil conspiracy.

The trial court granted defendants' motion for summary disposition, finding that defendants did not owe any legally cognizable duty of care to plaintiffs in connection with the tinting of Mahan's windows; that MCL 257.709 did not prevent the application of window tint film; that plaintiffs were neither parties to, nor third-party beneficiaries of the contract between Mahan and defendants for the tinting of the windows; and that no claim for civil conspiracy could lie in the absence of the establishment of an underlying tort.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 118 (2002). In reviewing the trial court's decision, this Court must review the record in the light most favorable to the nonmoving party. *Dressel, supra* at 561.

III. ANALYSIS

A. Duty

Plaintiffs argue that the trial court erred in determining that defendants owed no legal duty to plaintiffs. We disagree. Whether defendants owed a duty to plaintiffs is a question of law subject to de novo review. *Fulz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

"The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. 'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Fulz, supra* at 463 (internal citations omitted). "Duty" is a question whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the relationship between individuals that imposes a legal obligation on one for the benefit of the other. *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992).

MCL 257.709 provides in relevant part:

(1) A person shall not drive a motor vehicle with . . .

> (a) . . . nonreflective film upon or in the front windshield, the side windows immediately adjacent to the driver or front passenger, or the

(…continued)

whichever is closer to the top of the windshield." MCL 257.709(1)(a). However, this restriction "shall not apply to: . . . a vehicle registered in another state, territory, commonwealth of the United States, or another country or province. . . . [or to a] special window treatment or application determined to be necessary by a physician or an optometrist, for the protection of a person who is light sensitive or photosensitive" MCL 257.709(3)(d) and (e).

> sidewings adjacent to and forward of the driver or front passenger, except that a tinted film may be used along the top edge of the windshield and the side windows, or lower than the shade band, whichever is closer to the top of the windshield.
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> * * *
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> (3) This section shall not apply to:
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> * * *
>
> (d) . . . a vehicle registered in another state, territory, commonwealth of the United States, or another country or province.
>
> (e) A special window treatment or application determined to be necessary by a physician or an optometrist, for the protection of a person who is light sensitive or photosensitive, if the owner or operator of a motor vehicle has in possession a letter signed by a physician or optometrist, indicating that the special window treatment or application is a medical necessity.

MCL 257.709 is limited in application to the operation of vehicles on public highways. MCL 257.601.

The primary goal of statutory interpretation is to give effect to the Legislature's intent. When determining that intent, a court must look first at the language of the statute. If the language is clear and unambiguous, judicial construction is not permitted. If reasonable minds can differ regarding the meaning of the language used, then judicial construction is appropriate. Unless defined in the statute, every word or phase in the statute should be given its plain and ordinary meaning, considering the context in which the words are used. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998); *Lewis v LeGrow*, 258 Mich App 175, 183; 670 NW2d 675 (2003). Stated differently, "[i]f the language used is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary." *Karl v Bryant Air Conditioning*, 416 Mich 558, 567; 331 NW2d 456 (1982). We find that the language used in MCL 257.709 clearly and unambiguously governs the conduct of the vehicle operator and does not apply to defendants in this case.

Further, as set forth in its title, the Motor Vehicle Code is designed to provide for the civil liability of owners and operators of vehicles and "[i]t is a well-recognized principle that an act shall not exceed the scope of its title." *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 589-590; 581 NW2d 272 (1998). Therefore, our Supreme Court determined in *Klinke* that, "[a]s a matter of statutory interpretation, we must not, and under constitutional principles we cannot, apply statutes in the motor vehicle code to cases involving the civil liability of manufacturers." *Id.* at 591. Similarly, there is no basis in either the title to the motor vehicle code, or in MCL 257.709 itself, that would permit this Court to extend application of that provision to defendants.

In the absence of any statutory obligation on the part of defendants not to tint Mahan's window, plaintiffs must establish the existence of a common-law duty to support their negligence claim. Plaintiffs rest primarily on foreseeability in arguing that such a duty existed. However,

foreseeabilty is but one factor to be considered and "other considerations may be, and usually are, more important." *Id.* Thus,

> The mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. Also, to require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant. It is the fact of the existence of this relationship which the law usually refers to as a duty on the part of the actor. [*Id.*, quoting *Samson v Saginaw Professional Bldg Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).]

As our Supreme Court has explained, "[w]hether a retailer has a duty to protect a member of the public from the criminal acts of a customer depends on the relationship between the parties, the nature and foreseeability of the risk and any other considerations that may be relevant to the issue." *Buczkowski, supra* at 103. Therefore, the "ultimate decision turns on whether a sufficient relationship exists between a retailer and a third party to impose a duty" on the retailer to protect the third party from harm under the circumstances presented by this case. *Id.*

Here, as in *Buczkowski*, the relationship between defendants and Mahan was "simply that of retailer and customer, where the customer later criminally injured" a third party. This case does not present the situation where one party has entrusted himself to the protection of another to provide a place of safety as in landlord-tenant, innkeeper-guest, and common-carrier-passenger situations, where the defendant has some knowledge of an assailant's dangerous propensities, where defendant has control over the premises on which a party was injured, or where an innocent bystander was injured by a defective product. *Id.* at 104, n 9. Rather this is a case where a customer purchased a product, which is legal to sell and which is legal to use under certain circumstances, and then used it in a manner violating statutory law. Plaintiffs assert that the balance of societal interest at stake in the present case includes providing safe travel for Michigan motorists and that MCL 257.709 was enacted to serve this interest. That statute imposes liability for *operating* a vehicle with tinted windows on the *operator*, in this case Mahan. Plaintiffs provide no basis for this Court to extend an extra-statutory duty on defendants to prevent vehicle operators from violating the law. Defendants did not violate any law, did not cause Mahan to violate the law and did not have any duty to ensure that Mahan did not violate the law. Mahan was in complete control over her vehicle and made an independent decision to operate it in violation of MCL 257.709. The responsibility for the results of that decision lie solely with Mahan. Defendants owed no legal duty to plaintiffs to refrain from applying window tint to Mahan's truck. In the absence of such duty, summary disposition was properly granted as to plaintiffs' negligence claim. *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 441; 569 NW2d 836 (1997).

B. Rebuttable Presumption of Negligence

Plaintiffs further assert that a violation of a safety or penal statute creates a rebuttable presumption of negligence, citing *Klinke, supra* at 592, and that defendants' application of tinting film to Mahan's vehicles violated Michigan statutory law thereby creating a rebuttable

presumption of negligence. However, as defendants did not violate any law in applying the tinting film to Mahan's windows, no rebuttable presumption of negligence exists in this case.

C. Breach of Contract

Plaintiffs argue that the trial court erred in granting summary disposition as to their breach of contract claim. We disagree. Plaintiffs were neither parties to, nor third-party beneficiaries of, the contract between defendants and Mahan for the tinting of Mahan's windows. As such, they have no right of enforcement of that contract. MCL 600.1405 defines third-party beneficiary as a "person for whose benefit a promise has been made by way of contract" and explains that "a promise shall be construed as to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or do or refrain from doing something directly to or refrain from doing something directly to or for said person." Defendants did not undertake to do or refrain from doing anything directly for plaintiffs. Further, to the extent that plaintiffs are arguing that defendants had a contractual obligation to the general public to refrain from tinting Mahan's windows, such an argument would fail unless plaintiffs could establish that a promise was undertaken directly to or for a class of persons less than the entire public; that defendants and Mahan were "clearly aware that the scope of their contractual undertakings encompasse[d] [plaintiffs, who were] directly referred to in the contract." *Koenig v City of South Haven*, 460 Mich 667, 677, 680; 597 NW2d 99 (1999). Such is clearly not the case. Thus, there is no basis for plaintiffs' breach of contract claim and that claim was properly dismissed by the trial court.

D. Conspiracy

Plaintiffs argue further that the trial court erred in granting summary disposition on their civil conspiracy claim, asserting that defendants and Mahan entered into an illegal venture to allow Mahan to violate MCL 257.709. We disagree. A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose or to accomplish a lawful purpose by criminal means. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). A civil conspiracy claim standing alone is not actionable; it is necessary to prove a separate actionable tort underlying the conspiracy. *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). Thus, a civil conspiracy claim fails as a matter of law in the absence of a viable underlying tort. *Id.*

As discussed above, plaintiffs cannot establish any viable underlying claim against defendants. Nor can plaintiffs establish any unlawful purpose or unlawful means in defendants' actions. Rather, defendants entered into a legal contract to apply window tint to Mahan's vehicle according to Mahan's specifications and fully performed their obligations under that contract. Thereafter, Mahan operated her vehicle in a manner contrary to statutory law. There is no indication that defendants planned, conspired or intended that Mahan operate her vehicle in this manner. Defendants did not solicit Mahan or otherwise convince her to have her windows tinted and then operate her vehicle in violation of statutory law. Plaintiffs assert that defendants knew

that Mahan was going to operate her truck in violation of MCL 257.709.[2] However, plaintiffs do not indicate how such knowledge equivocates to concerted action to violate that statute. Defendants had no duty to ensure that its customers obeyed the law while operating their vehicles. Certainly, Mahan could have operated her vehicle with its tinted windows in a manner not violative of MCL 257.709. The fact that she chose to do otherwise, without any involvement of defendants in that choice does not establish that defendants and Mahan engaged in a concerted action to achieve a criminal purpose.

E. Additional Issues

Plaintiffs also argue that the trial court's grant of summary disposition was premature because it was granted before the close of discovery. However, summary disposition may be appropriate "if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW32d (2003). Such was the case here. Thus, the trial court's granting of summary disposition was not premature.

Finally, plaintiffs argue that the trial court erred in concluding that testimony of plaintiffs' expert as to causation was inadmissible. However, the trial court made no such ruling. Instead, the trial court merely indicated only that it was questionable whether that testimony would be permitted at trial, explaining that it was speculative and was not based on facts in the record. Thus, there is no ruling for this Court to review. Further, having already determined that plaintiffs' negligence claim failed as a matter of law based on a lack of duty, the trial court did not need to reach the issue of proximate cause and therefore, did not need to rule on the ultimate admissibility of that testimony. Nor need we do so.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

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[2] We conclude that the plain meaning of MCL 257.709 applies to the conduct of owners and operators of motor vehicles, not to the conduct of defendants. Contrary to plaintiff's arguments, the Michigan Legislature, not this Court, would have to amend the statute in question in order to impose civil liability upon individuals who are not owners or operators of a motor vehicle.